

The Honorable Robert J. Bryan

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

CIVIL ACTION NO. 3:17-cv-05806-RJB

STATE OF WASHINGTON’S
RESPONSE TO THE GEO GROUP
INC.’S MOTION TO COMPEL

I. INTRODUCTION

Instead of issuing subpoenas directly to the Department of Labor & Industries (“L&I”), the Department of Corrections (“DOC”), and the Department of Social and Health Services (“DSHS”), the agencies with custody and control of documents that The GEO Group, Inc. (“GEO”) seeks in discovery, GEO asks this Court to compel the Attorney General’s office (“AGO”) to search the files of the *lawyers* for those state agencies. Further, GEO seeks an order compelling counsel for the State of Washington (“State” or “Washington”) to identify the specific custodian of each document produced even though such information is not kept in Washington’s usual course of business. Neither request is supported by law.

II. FACTUAL BACKGROUND

GEO served its first set of discovery, including requests for production of documents, on January 11, 2018. Baker Decl. ¶ 3, Ex. A. Washington responded to GEO’s discovery requests on February 12, 2018. *Id.* at ¶ 4, Ex. B. In preparing its response, Washington searched the files

1 of the AGO's Civil Rights Unit ("CRU"), which initiated this investigation and litigation; the
 2 Public Affairs Unit, the unit that coordinates press coverage regarding this litigation; the
 3 executive leadership team members, who provided final approval of the litigation, as well as the
 4 files of all Assistant Attorneys General who CRU conferred with prior to filing this litigation.
 5 Baker Decl. ¶ 5. To the extent GEO's requests required a search of other state agencies'
 6 documents, Washington objected that such materials are irrelevant to GEO's compliance with
 7 state law, and that in any event lawyers in CRU did not have control over separate state agencies
 8 and advised GEO to serve subpoenas upon them directly for information, documents or
 9 testimony. Baker Decl. ¶ 4, Ex. B.

10 With respect to the form of document production, in March 2018, during a telephonic
 11 conference, GEO's local counsel informed Washington that GEO preferred that Washington
 12 produce responsive documents in a PDF format. Baker Decl. ¶ 6. On April 10, 2018, Washington
 13 complied with GEO's request. Baker Decl. ¶ 7, Ex. C. Three weeks later, on April 27, 2018,
 14 GEO's New York-based counsel requested that Washington reproduce documents according to
 15 that law firm's preferred production protocols. Baker Decl. ¶ 8. Washington agreed inasmuch as
 16 Washington's systems of maintaining documents in the ordinary course of business allowed it
 17 to do so. *Id.*

18 On July 2, 2018, GEO served its second set of discovery requests. GEO again sought
 19 information from non-party state agencies. Baker Decl. ¶ 9, Ex. D. Not only did GEO again rely
 20 on Rule 34, which governs *party* discovery, GEO's new requests were far-reaching and broad.
 21 *See id.* (requesting information and documents as to "how the State calculates staffing needs for
 22 each Washington Department of Corrections facility," the "compensation of all Washington
 23 State inmates or detainees for their participation in any work program in any state facility," and
 24 the "financial transactions . . . between Washington and any contractor that provides detention
 25 or private correctional or detention services").
 26

1 In an August 20, 2018 letter, AGO again confirmed that it did not have state agency
 2 materials from L&I, DOC, or DSHS in its possession, custody, or control. Baker Decl. ¶ 11, Ex.
 3 F. Likewise, on August 22, 2018, Washington addressed GEO's concerns about metadata and
 4 provided GEO with a spreadsheet with as much custodian information as was available. St. John
 5 Decl. ¶ 7.

6 III. ARGUMENT

7 GEO is not entitled to the requested documents through party discovery. In the present
 8 case, Washington seeks a declaration that GEO comply with its laws and disgorge unjust profits.
 9 When the State sues as *parens patriae*, the State does not make every government entity in the
 10 state a party to that lawsuit. While GEO may seek information in support of its affirmative
 11 defenses, the state agencies in possession of the information GEO seeks are not parties to this
 12 action and no relief is sought on their behalf. Further, neither the Attorney General, as an
 13 independent public official, nor the AGO, as an independent state agency, have possession,
 14 custody, or control over the documents of other agencies. Nor does the AGO have authority or
 15 the practical ability to produce these documents. Since GEO is equally able to seek discoverable
 16 information, if any, through third-party discovery, and since Washington does not keep the
 17 custodian information GEO seeks in its usual course of business, GEO's motion to compel
 18 should be denied.

19 A. GEO's Discovery Requests Seek Material that Is not Relevant to any Claim or 20 Defense

21 As an initial matter, GEO's discovery requests do not meet Federal Rule of Civil
 22 Procedure 26(b)(1)'s threshold relevance requirement. Although GEO argues information
 23 regarding any inmate labor practices at DOC is relevant to its unclean hands defense, DOC's
 24 inmate labor practices are—unlike GEO's—statutorily exempt from Washington's minimum
 25 wage laws. Wash. Rev. Code § 49.46.010(3)(k). Even if the DOC pays inmates less than the
 26 minimum wage at its facilities, Washington's hands are not thereby “unclean.” Likewise, GEO's

request for information about what L&I knew about GEO's practices years before this lawsuit is similarly flawed. Even if L&I knew of GEO's practices for decades, such knowledge would not bar Washington from bringing this suit now. *See United States v. Phillip Morris, Inc.*, 300 F. Supp. 2d 61, 75 (D.D.C. 2004) ("[L]aches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest"). None of GEO's requests for non-party agency documents are relevant.

B. The AGO Does Not Have Control over the Documents of State Agencies

Inasmuch as this Court may find that the requested material may meet Federal Rule of Civil Procedure 26(b)(1)'s relevance threshold, GEO fails to meet its burden of showing that the AGO controls the documents.

As its motion concedes, GEO bears the burden of proving the AGO has control over the documents sought. *See United States v. Int'l Union of Petroleum & Indus. Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir. 1989). "Proof of theoretical control is insufficient; a showing of actual control is required." *In re Citric Acid Lit.*, 191 F.3d 1090, 1107 (9th Cir. 1999). In *Citric Acid Litigation* for example, the plaintiffs argued "control" should be defined in a manner that focuses on a party's "practical ability" to obtain the requested documents. *Id.* at 1107. The Ninth Circuit rejected that argument, reasoning that, even if a party had the practical ability to obtain the documents, the other entity "could legally—and without breaching any contract—continue to refuse to turn over such documents." *Id.* at 1108. Indeed, at least two district courts have found discovery of state agencies through their state attorneys general to be barred because "the State Attorneys General [had] no more way of compelling production than [the defendant] [did] if an agency refuse[d] to cooperate." *United States v. Am. Express Co.*, No. 1:10-cv-04496 (NGG)(RER), 2011 WL 13073683, at *3 (E.D.N.Y. July 29, 2011) (hereinafter "*American Express*"); *Colorado v. Warner Chilcott Holdings Co. III, Ltd.*, No. 05-2182, slip op. at 8 (D.D.C. May 8, 2007) (hereinafter "*Warner Chilcott*") (attached to Baker Decl. ¶ 13, Ex. F) (refusing to compel discovery through the state attorneys general because the state attorneys general operated

1 independently of the state governors and, therefore, could not force separate state entities to
2 produce documents).

3 Just like in *American Express* and *Warner Chilcott*, here, the AGO has no more way of
4 compelling production from L&I and DOC than GEO. In Washington, the Governor and
5 Attorney General operate as independent executives under the state constitution. *See* Wash.
6 Const. art. 3, § 1. Accordingly, the Governor and Attorney General have distinctly separate areas
7 of authority. *Compare* Wash. Const. art. 3, § 5 (setting forth the Governor’s duties), *with* Wash.
8 Const. art. 3, § 21 (setting forth the Attorney General’s duties). While the Attorney General is
9 designated to act as counsel for state agencies, *see* Washington Revised Code § 43.10.040, the
10 Attorney General is an independently elected public official, who does not have the authority to
11 set agency policies or priorities, nor the practical ability to produce agency documents, which
12 are obtained through compulsory process directed to the agency. *See* Wash. Rev. Code
13 § 43.06.010 (requiring that the Governor—not the Attorney General—supervise the conduct of
14 all executive and ministerial agencies).

15 GEO nevertheless argues that it’s simply “common sense” that the AGO, as the State’s
16 legal adviser, could obtain information from non-party state agencies. ECF 113 at 8. GEO’s
17 argument, which lacks citation to any law, regulation, or policy requiring state agencies to
18 respond to an AGO request for documents, is mistaken. While it is undisputed that the AGO
19 represents and advises state agencies, the decision to bring this action was not done on behalf or
20 in protection of any state agency. *See American Express*, 2011 WL 13073683, at *2 (determining
21 state agencies not to be parties for purposes of discovery in an action brought by the state
22 attorneys general because the state attorneys general acted independently of the state agencies).
23 The AGO is akin to a law firm with many different clients. Just as a law firm does not subject
24 all its clients to party discovery when it sues on behalf of only one client, the AGO cannot subject
25 all state agencies to party discovery when it sues on behalf of one client—here, Washington
26 residents. *See New York ex rel. Boardman v. Nat’l R.R. Passenger Corp.*, 233 F.R.D. 259, 265

1 (N.D.N.Y. 2006) (hereinafter “*Amtrak*”) (refusing to compel production from the state
 2 Comptroller via a Rule 34 subpoena when the State sued on behalf of the Department of
 3 Transportation, a different agency).

4 GEO’s case citations to argue otherwise are inapposite. In fact, nearly all of the cases
 5 GEO cites as compelling the AGO to produce documents from non-parties involve pro se
 6 litigants who did not have the capability to issue third-party subpoenas or otherwise obtain the
 7 requested information themselves. *See, e.g., Bovarie v. Schwarzenegger*, No.08cv1661 LAB
 8 (NLS), 2011 WL 767249, at *1 (S.D. Cal. Feb. 25, 2011); *Ochotorena v. Adams*, No. 1:05-cv-
 9 01524-LJO-DLB (PC), 2010 WL 1035774, at *1 (E.D. Cal. Mar. 19, 2010); *Alexander v. Cal.*
 10 *Dep’t of Corr.*, No. 2:08-cv-2773 MCE KJN P., 2010 WL 4069953, at *1 (E.D. Cal. Oct. 18,
 11 2010). The remaining cases GEO does cite that do not involve pro se litigants are simply
 12 inapplicable. In *State v. Reed*, a prosecuting attorney sought to compel a defendant’s medical
 13 records from defendant after defendant’s attorneys instructed the state hospital not to release
 14 such information. 429 P.2d 870 (Wash. 1967). While the state supreme court denied the
 15 prosecuting attorney’s request and suggested the prosecuting attorney request the Attorney
 16 General advise the state hospital to produce the medical records, nowhere did the state supreme
 17 court determine the Attorney General had a legal right to the state hospital’s records or an
 18 obligation to produce them. *See id.* at 872 (observing only that a request to the Attorney General
 19 “*may have accomplished the purpose [of obtaining defendant’s medical records]*”) (emphasis
 20 added); *see also Wilson v. Washington*, No. C16-5366 BHS, 2017 WL 518615, at *3 (W.D.
 21 Wash. Feb. 8, 2017) (“[I]t *appears* that . . . the State . . . ha[s] authority to obtain documents”) (emphasis added). In *Board of Education of Shelby County, Tennessee v. Memphis City Board*
 22 *of Education*, No. 2:11-CV-02101-SHM, 2012 WL 6003540, at *3 (W.D. Tenn. Nov. 30, 2012),
 23 the court allowed plaintiffs to seek discovery of the General Assembly through the state attorney
 24 general only after explaining that the attorney general raised no argument that it lacked control
 25
 26

1 over the documents and made no meaningful relevance or undue burden arguments. The AGO
2 makes each of those arguments here.

3 In sum, GEO falls far short of its burden of showing that the AGO has the legal right to
4 obtain the information in the possession of state agencies. *See In re NCAA Student-Athlete Name*
5 *& Likeness Litig.*, No. 09-cv-01967CW (NC), 2012 WL 161240, at *3 (N.D. Cal. Jan. 17, 2012)
6 (refusing to find NCAA “control” over documents held by individual members institutions even
7 where the NCAA’s bylaws granted it “power to collect information and data from members”).
8 Despite GEO’s vague protestations that the AGO has the “requisite relationship” over state
9 agencies, *see* ECF 113 at 9, GEO offers no evidence of such control. *See Int’l Union*, 870 F.2d
10 at 1453-54 (“Control must be firmly placed in reality, not in an esoteric concept such as [an]
11 ‘inherent relationship.’”) (citations omitted).

12 **C. Neither L&I, DOC, nor DSHS Are Parties to This Litigation**

13 The State of Washington is the Plaintiff in this suit—not L&I, DOC, or DSHS. Although
14 GEO repeatedly notes that L&I is referenced in the State’s complaint, that single allegation
15 merely recites that L&I enacts administrative rules that may be relevant to the minimum wage
16 claim. ECF 1-1 ¶ 3.2. GEO does not—and cannot—argue that L&I is actually a party to this
17 lawsuit. Not only has the State repeatedly made clear that this action is brought by the Attorney
18 General pursuant to his own statutory authority, *see* ECF 17 at 14, GEO itself conceded in its
19 motion to dismiss that “the Attorney General does not allege that it is suing on behalf of L&I, or
20 exercising any of L&I’s statutory enforcement under state law,” *see* ECF 10 at 13.

21 Since L&I is clearly not a party, GEO resorts to arguing L&I is the agency “at issue” in
22 this litigation. ECF 113 at 11. GEO is still mistaken. It is the AGO that brings suit here as *parens*
23 *patriae* to enforce state law and disgorge unjust profits. The AGO does not represent the interests
24 of L&I or any governmental agency, nor does it seek remedies based on harm to L&I or any
25 governmental agency. While L&I has statutory authority to enforce the state’s minimum wage
26 laws, the AGO is not required to consult with or obtain approval from L&I before initiating this

1 action. *See* Wash. Rev. Code § 43.10.030(1) (setting forth the Attorney General’s own authority
2 to act in any court on a matter of public concern).

3 GEO’s reliance on *Amtrak*, 233 F.R.D. at 265, is therefore misplaced. In *Amtrak*, the
4 State of New York “by and through” its Department of Transportation sued Amtrak over a
5 contract dispute. Amtrak issued discovery requests to the plaintiffs seeking documents from the
6 Comptroller, who had performed auditing work relevant to the contract. While Amtrak argued
7 “the State of New York” is the named party and the State of New York was a single, superior
8 entity that controlled all state agencies, the court rejected Amtrak’s view. It determined that,
9 while “the State” was the named party, the state was acting only on behalf of the Department of
10 Transportation, the party to the contract at issue, and denied Amtrak’s discovery request for
11 information from the Comptroller.

12 Like in *Amtrak*, the AGO does not act as a single, superior entity with control over all
13 state agencies. The AGO cannot be aggregated together with L&I, DSHS, or DOC for purposes
14 of discovery where, as here, the agencies are neither interrelated nor subject to common
15 executive control. *See Warner Chilcott*, slip op. at 8. The AGO, therefore cannot, as GEO
16 requests, “admit that the State has not previously sought to enforce the Minimum Wage Act or
17 bring unjust enrichment claims against GEO.” *See* ECF 114-5, Response to RFA No. 1 (refusing
18 to answer on behalf of all state agencies, but answering on behalf of the AGO). The AGO brings
19 this action on behalf of its residents—not any governmental agency. The AGO does not have an
20 obligation to respond or produce information in the possession of non-party agencies.

21 **D. GEO Should Seek Discovery Directly from Third-Party State Agencies**

22 Federal Rule of Civil Procedure 26(c)(1)(C) allows a court to enter an order “prescribing
23 a discovery method other than the one selected by the party seeking discovery.” Even if the Court
24 were persuaded that the AGO could legally be compelled to produce documents in the possession
25 of non-party state agencies, several prudential considerations suggest that Rule 45 subpoenas are
26 a more appropriate avenue for GEO to seek the desired information. *See Perez v. United States*,

No. 13cv1417-WQH-BGS, 2016 WL 705904, at *5 (S.D. Cal. Feb. 23, 2016) (directing plaintiffs to subpoena the requested information from the government agency directly instead of the retired government officer “in the interest of efficiency”). *See also California ex rel. Lockyer v. Superior Court*, 19 Cal. Rptr. 3d 324, 338 (Ct. App. 2004) (directing defendants to serve subpoenas directly upon the relevant state agencies “to obtain documents and witnesses from state agencies”).

First, GEO’s requests for production are unduly burdensome as directed to the AGO. GEO’s discovery requests are incredibly broad; they include but are not limited to (1) all documents showing “each and every employee that supervised prisoners/detainees incarcerated or detained by Washington State” who worked in the kitchen, laundry facilities, or as janitorial staff in a state correctional or detention facility since 2005 (RFP Nos. 60-62); (2) all documents that “relate to staff recruitment by [DOC or DSHS] operated or controlled facilities from local communities and those facilities’ contribution to the local economy” (RFP No. 63); (3) all documents “reflecting financial transactions, such as invoices for reimbursement of payments for any inmate or detainee work program between Washington and any contractor” (RFP No. 54); (4) “[a]ll versions, including drafts, of Washington State prisoner/detainee manuals discussing prisoner/detainee work programs” (RFP No. 56); (5) all documents showing “how the State calculates staffing needs for each DOC facility” (RFP No. 46), and (6) documents relating to discussions about amounts paid to prisoners/detainees incarcerated or detained by Washington State since 2005 (RFP No. 59). Baker Decl. ¶ 9, Ex. D.

None of this requested information originates with the AGO. If the AGO is in possession of any of these documents, it would have gathered them in the course of its representation of a client agency and they likely would be protected by attorney-client privilege or the work product doctrine. Although GEO claims the AGO likely possesses nonprivileged documents responsive to its request, GEO’s argument relies on the existence of a single contract executed between GEO and the DOC, approved by the AGO “as to form only” and printed on DOC letterhead.

1 ECF 113 at 11 n.2. However, the fact that the GEO-DOC contract invokes the AGO's name
 2 once—to indicate that an unnamed “WA Assistant Attorney General” “[a]pproved [the contract]
 3 as to form only”—hardly suggests the AGO is in possession of the contract. In fact, the GEO-
 4 DOC contract highlights the undue burden that would be placed on the AGO if made to search
 5 for GEO's requested information through its attorneys' files. Without knowing the name of the
 6 Assistant Attorney General who approved the contract, in order to respond to GEO's request,
 7 the AGO would have to search the files of more than 500 Assistant Attorneys General in 27
 8 different legal divisions.

9 Second, GEO's requests are more appropriately responded to by the state agencies
 10 themselves. L&I, DOC and DSHS are separate and distinct state agencies. Each may be subject
 11 to federal and state laws that govern issues such as confidentiality and disclosure. The
 12 reasonableness of ordering discovery may vary between the state agencies because the burdens
 13 of compliance with GEO's requests vary. The Assistant Attorneys General who represent
 14 Washington in this lawsuit are civil rights attorneys and may lack specialized legal or factual
 15 knowledge regarding the disclosure limits applicable to particular state agencies. It is possible
 16 that each state agency may wish to raise issues of law, such as the deliberative process privilege,
 17 or issues of fact, such as the burden required to comply given the minimal (if any) relevance of
 18 state-agency practices in this litigation. Requiring GEO to seek information and documents
 19 directly from the identified state agencies will allow those agencies to raise any appropriate
 20 objections and protect their particular interests. *See Lockyer*, 19 Cal. Rptr. 3d at 338.

21 Finally, public policy dictates that GEO be required serve third-party discovery directly
 22 on state agencies. It would be unduly burdensome if any time the AGO engages in an
 23 enforcement action, the AGO is required to search for documents from each of its 26 cabinet
 24 agencies and more than 230 boards and commissions. *See id.* Here, even assuming that the AGO
 25 could comply with GEO's requests, the time and cost to to collect, review, and produce discovery
 26 from three large cabinet agencies will waste resources and chill future enforcement efforts. If

1 GEO remains determined to seek information about state agency practices, the Court should
2 direct GEO to seek it by issuing third-party subpoenas.

3 **E. The State Produced Documents as They Were Kept “In the Usual Course of**
4 **Business”**

5 Washington has fulfilled its discovery obligations with respect to the form of the
6 documents produced. Federal Rule of Civil Procedure 34(b)(2)(E)(i)-(ii) requires parties to
7 produce documents either as they were kept “in the usual course of business” or to organize and
8 label them to correspond to the categories in the request. Upon GEO’s belated request for
9 production in a new format, Washington reproduced documents to include custodian
10 information, indicating where within its network documents were collected. While GEO now
11 demands Washington identify the individual custodians for each document, Washington does
12 not keep documents that way and Federal Rule of Civil Procedure 34(b)(2)(E)(i)-(ii) nowhere
13 requires such detailed information not kept in the usual course of business.

14 First, neither case that GEO cites stands for the proposition that parties must produce
15 specific custodian information. In *Hullinger v. Anand*, No.CV15-7185 SJO (FFMx), 2016 WL
16 7444620, at *9 (C.D. Cal. Aug, 19, 2016), the court ordered production of custodian information
17 only after recognizing the parties had previously agreed to exchange such information. In *City*
18 *of Colton v. American Promotional Events, Inc.*, 277 F.R.D. 578, 584 (C.D.Cal. 2011), the court
19 merely noted ESI productions should be produced in “the usual course of business” and only
20 include “the provenance of the files and some context as to their meaning.” Here, Washington
21 has provided that information. It is clear which documents were collected from the CRU, which
22 documents were collected from the AGO’s leadership team, and which documents were
23 collected elsewhere. Baker Decl. ¶ 12.

24 Second, GEO does not need custodian information to argue its affirmative defenses. GEO
25 identifies only one reason it requests custodian information—to determine when Washington
26 officials were “put on notice concerning GEO’s administration of the VWP.” ECF 113 at 12.

1 However, GEO already has this information. GEO held a Federal Rule of Civil Procedure
 2 30(b)(6) deposition on August 10, 2018, where Washington's designee testified that CRU was
 3 established in January 2015 and was made aware of GEO's labor practices and the likelihood
 4 that it may violate state law in May 2017. Baker Decl. ¶ 10, Ex. E.

5 Third, individual custodian information is clear from many of the documents Washington
 6 produced. Of the 477 documents produced, over 100 are e-mails, which indicate both the author
 7 and recipient of the document. Baker Decl. ¶ 12. In addition, the individual custodian of each e-
 8 mail also appears in the filename of the .pst.¹ St. John Decl. ¶¶ 6-7. Of the remaining documents,
 9 the documents are electronically stored on shared AGO networks for which more specific
 10 custodian information is unavailable. St. John Decl. ¶¶ 3-5.

11 The Court should deny GEO's motion to compel. GEO does not need the metadata nor
 12 does Federal Rule of Civil Procedure 34(b)(2)(E)(i)-(ii) require Washington to create more
 13 detailed custodian information where none otherwise exists.

14 IV. CONCLUSION

15 For the foregoing reasons, the Court should deny GEO's motion to compel and direct
 16 GEO to issue third-party subpoenas for the information it requests from non-party state agencies.

17 Dated this 10th day of September, 2018.

18 Respectfully submitted,

19 BOB FERGUSON
 20 Attorney General of Washington

21 s/ Marsha Chien
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25 ¹ To the extent GEO did not receive filenames in the load file produced, Washington is
 26 willing to create a custodian list for those email communications.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

10th day of September, 2018

s/ Marsha Chien

Marsha Chien